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HAROLD B. WILL

No. 569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

BYRON E. BORING, *Petitioner*

v.

STATE OF OHIO, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on November 4, 1953, denying application for rehearing of orders entered October 14, 1953.

Opinions Below

The memorandum opinion of the trial judge, Court of Common Pleas of Muskingum County, overruling petitioner's motion for a new trial is unreported. The opinion of the Court of Appeals of Muskingum County is not reported. The order of the Supreme Court of Ohio dismissing the appeal is reported at 160 Ohio St. 188, 115 N. E. 2d 3.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on October 14, 1953. Petitioner's application for rehearing was denied on November 4, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(1).

The federal questions sought to be reviewed were raised as follows:

(a) In the trial court, Court of Common Pleas of Muskingum County, by motion to dismiss count four of the indictment and by motion for a new trial (R.). The trial court denied both motions, the first motion orally from the bench (R.) and the second motion by opinion (R.).

(b) In the Court of Appeals of Muskingum County by assignments of error (R.). That court in its opinion ruled that these were not well taken and affirmed the judgment of the trial court (R.).

(c) In the Supreme Court of Ohio by Assignment of Errors in support of notice of appeal and support of motion for leave to appeal (R.). That court dismissed the appeal filed as of right, and denied leave to appeal, on the ground that no debatable constitutional question is involved (R.).

Question Presented

Whether petitioner's conviction for a criminal offense by a state court constitutes a denial of the due process of law guaranteed by the Fourteenth Amendment in that (1) petitioner's conviction was based upon the testimony of a critical witness who was not sworn, and (2) objection of petitioner's counsel at the trial was overcome by the misrepresentation of the prosecuting attorney that the witness had been sworn before a clerk and that he had been present at the time.

Statement

Petitioner, Byron E. Boring, was indicted under Section 13104 of the General Code of Ohio for the offense of obtaining property by false pretense and with intent to defraud. The indictment charged thirteen separate offenses, two of which were dismissed for lack of any evidence whatever. The jury acquitted petitioner on seven of the remaining eleven counts, and returned a verdict of guilty on four.

A key witness for the prosecution, June Shackelford (Braden) was not sworn. At the close of the State's case, counsel for the petitioner moved that count four be dismissed on the ground that the witness June Shackelford was not sworn.

Thereupon there ensued this colloquy: (Typed Tr. p. 412, R.)

> Counsel for the State: I will tell this court June Shackelford in the first place was sworn in as a witness, I was present.
>
> Counsel for the Defendant: When the witnesses were over there Mr. Barbour came over and said June Shackelford is not here but she will be here when it is time to testify.
>
> Counsel for State: She was sworn in by Raymond Crozier [Deputy Clerk], ask him.
>
> The Court: Witnesses frequently come in when not sworn, but they are sworn in by the Clerk's office before they enter the court room.
>
> Counsel for Defendant: If she was sworn in then we have no knowledge of it. I thought all witnesses had to be sworn in before the accused.
>
> The Court: No, they are frequently sworn in in the Clerk's office. They have to testify in the presence of the accused but that is all.

The Court ruled that the swearing in by the Clerk in his office was sufficient, and that defendant had not produced evidence that she was not sworn by a proper officer. (Typed Tr., p. 420, R.).

Petitioner was sentenced to the penitentiary on the four counts on which he had been found guilty, the sentences to run concurrently.

Petitioner filed a motion for a new trial, to which an affidavit by Raymond Crozier, deputy clerk of court of Muskingum County, Ohio, was attached in which affiant stated that to his personal knowledge June Shackelford (Braden) was not sworn before she gave her testimony. Petitioner's motion duly raised the question that accordingly the conviction was a denial of the due process of law guaranteed by the Fourteenth Amendment. The motion for new trial was overruled. (R.). On appeal, the Court of Appeals of Muskingum County affirmed the conviction. Its opinion on this question (R.) asserted (1) The trial court evidently found on the evidence before it that Shackelford was sworn; (2) The right to object to the use of unsworn testimony was waived; and (3) The testimony of this witness related to only one count of the indictment.

On October 14, 1953, the Supreme Court of Ohio dismissed the appeal filed as of right, and denied petitioner's motion for leave to appeal, on the ground that there was no debatable Constitutional question. A petition for rehearing was denied on November 4, 1953.

The witness June Shackelford Braden testified (Typed Tr. pp. 48-56, R.), that a promissory note and chattel mortgage, which purported to be signed by June Shackelford and witnessed by Petitioner, was not in fact signed by her. She further testified that she had never used her maiden name, June Shackelford, since her marriage to Kenneth Braden, who worked for Anchor Loan Company with his office in the petitioner's store. It was later shown that this note and mortgage were sold by Petitioner to Anchor Finance Company.

The charge of the trial judge instructed the jury that June Shackelford's testimony was relevant not only to the question of whether petitioner was guilty in count four of the indictment, charging that petitioner obtained money under false pretense in connection with the sale of the note and mortgage purportedly signed by the witness, but also

to his guilt or innocence on the other counts, on the question of "intent to defraud":

> An intent to defraud, in your consideration of a specific count of the indictment, may be shown by similar offenses which may have occurred at about the same time of the particular charge under consideration; and this is no less so even though such similar offenses, if any, may themselves be the subject matter of other charges against the defendant; the repetition or uniform course of acting, if any, being possibly suggestive of defendant's purpose or intent, if you should so find and consider . . . (Typed Tr. p. 497, R.).

Specification of Errors To Be Urged

The Supreme Court of Ohio erred:

1. In failing to set aside petitioner's conviction as contrary to the due process of law guaranteed by the Fourteenth Amendment, in view of the fact that petitioner's conviction was based upon testimony of a critical witness who was not sworn, and that objection of petitioner's counsel at the trial was overcome by misrepresentation of the prosecuting attorney that the witness had been sworn, in his presence, by the deputy clerk.

2. In failing to reverse the judgment of the Court of Appeal affirming the conviction on the ground that the trial court had found that the witness was sworn, and that the right to object to the use of unsworn testimony was waived, when such finding was based upon the misrepresentation of the prosecuting attorney.

3. In denying and dismissing appeal from the Court of Appeals of Muskingum County on the ground that no debatable constitutional question was involved.

Reasons For Granting The Writ

1. This case presents the substantial question of Federal law, whether petitioner's conviction for a criminal offense by a State court constitutes a denial of the due process of law guaranteed by the Fourteenth Amendment. The claim

of denial of due process is predicated on these facts: Petitioner's conviction was based upon testimony of a critical witness who was not sworn. The objection of petitioner's counsel, taken at the trial, was overcome by the misrepresentations of the prosecuting attorney that the witness (June Shackelford) had been sworn before deputy clerk Crozier and that he had been present when the oath was administered. The trial court overruled the petitioner's objection upon the ground that such a swearing in was proper.

2. The content of the phrase "due process of law" is

> "to be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Twining* v. *New Jersey,* 211 U. S. 78, 100 (1908)

3. Notice and hearing are the first foundations of due process of law. And it is a primary and indispensable element of a hearing that the witnesses be sworn.

There is no principle more deeply ingrained in the common law than that the men on whose evidence the rights of free men are adjudicated, shall be accountable, under the laws of God and man, for evidence falsely given. At every stage, in the evolution of the trial as we know it today, this principle of accountability was firmly adhered to. Originally the jurors were themselves the witnesses, and it was, indeed, on that account that they were sworn, and acquired the name "juror." Indeed, as sworn men, they were liable to harsh penalties for a perjured verdict. Oral testimony by others, where permitted in early procedures, was always given under the sanction of the oath. And as the modern concept of the respective functions of jury and witnesses emerged, the statute which created the right to compel testimony simultaneously created the statutory crime of perjury for false testimony given in the courts (5 Elizabeth

c. 9). In a case recently cited by this Court, the fundamental importance of the contention that witnesses had not been properly sworn was such as to merit review on a writ of coram nobis in the House of Lords. *O'Connell* v. *Regina*, 11 Cl. and Fin. 155, 255, cited in *United States* v. *Morgan*, No. 31, decided January 4, 1954.

4. The recognition of accountability of prosecution witnesses, whether secured by oath or affirmation, as an essential element of a fair trial has been asserted by all the state courts which have considered the matter. As the Supreme Court of Iowa said in *State* v. *Lugar*, 115 Iowa 268, 269, 88 N. W. 333 (1901):

> "From the very inception of judicial procedure down to the present time some form of oath, or some recognition of accountability for falsely testifying has been required by lawmakers and by Courts."

An oath, or affirmation, of witnesses is a *sine qua non* of a "hearing." In reversing an order removing a policeman for neglect of duty because the witnesses before the Police Commission had not been sworn, the New York Court of Appeals said

> "(The requirement of a hearing) . . . contemplates a judicial responsibility for perjury, or some protection to the accused against falsehood. The issue was one of fact. The proceeding was judicial in character, and hence the tribunal before which the investigation was had could not dispense with the usual form of procedure by acting upon statements not given under the responsibility of an oath." *People* ex rel. *Kasschau* v. *Police Commissioners*, 155 N. Y. 40, 44, 49 N. E. 257 (1898).

Compare, *State* v. *Lugar*, supra, in which the principle of accountability secured by oath or affirmation is integrated with another fundamental element of due process in criminal procedure, the right of confrontation (115 Iowa at 270, 88 N. W. at 334):

> "The Constitution of this state guarantees to every man accused of a crime the right to be confronted with the witnesses against him, and this would be but a barren right, and afford the defendant no protection if such witnesses may testify without being sworn, or without in any way being subject to the penalties of perjury."

New trials have been ordered where a witness for the state testified without being sworn, although this fact was not discovered by the defendant until after verdict. *State* v. *Taylor,* 57 W. Va. 228, 50 S. E. 247 (1905); *State* v. *Lugar,* supra; *Gibbons* v. *Territory,* 5 Okl. Cr. 212, 115 Pac. 129.

It is said "to be the duty of the court to see that the oath is administered to the witness, and that the Defendant has a right to presume that a witness taking the stand has been sworn, and that a party convicted on unsworn evidence has not enjoyed the protection of the laws to which he is entitled." *Barr* v. *State* (Miss.), not reported, 23 So. 628 (1898), citing *Hawks* v. *Baker,* 6 Me. 72 (1829).

In *State* v. *Taylor,* the court noted, 57 W. Va., at 236, 50 S. E. 247, 250:

> "An oath is a sanction which the law says shall accompany the testimony of every witness, and courts cannot be permitted to dispense with it even by oversight. It can make no difference that the omission was an innocent mistake. Its effect is the same as if it had been otherwise. The object of the oath is to bind the conscience of the witness, as well as to make his action in testifying amenable to the criminal law. Wilful violation of the truth after having taken the oath exposes him to both temporal and spiritual punishment. Moreover, the administration of it is a solemn admonition to the witness at the time he testifies, well calculated to keep alive in his mind a sense of his responsibility both to God and to the law."

5. Assuming that in a proper case the right to sworn testimony may be waived, it would be contrary to the due

process clause to determine that in the circumstances of this case petitioner has waived his right to be confronted with sworn testimony.

This Court has consistently held, in cases involving misrepresentations, either by prosecuting attorneys or judges, which adversely affect constitutional rights, that the state convictions cannot stand consistently with the due process clause of the Fourteenth Amendment, whether the misrepresentation "savors of foul play or carelessness." *Townsend* v. *Burke,* 334 U. S. 736, 740; *Palmer* v. *Ashe,* 342 U. S. 134; *Mooney* v. *Holohan,* 294 U. S. 103. In *Gibbs* v. *Burke,* 337 U. S. 773, this Court expressly called attention to the imposition upon defendant by the district attorney's use of incompetent evidence, including his own unsworn offer of proof concerning missing articles.

Not only did the court and prosecuting attorney fail to assure that the witness was sworn, but when the objection was raised by the defense attorney, it was overcome by the prosecuting attorney's misrepresentation that he had been present when the witness had been sworn by the clerk outside the court room. That misrepresentation resulted in the court's finding, without further inquiry, that the witness had been sworn.

That misrepresentation, and the court's resulting finding and ruling, cannot properly be the basis of denial of a constitutional right. A prosecuting attorney is not a mere adversary attorney; he is a sworn minister of justice. Petitioner was misled by an officer of the court on whose representations he was entitled to rely under our conception. Cf. *Langford* v. *U. S.,* 76 S. W. 111, (Ct. App. Ind. Terr. 1903). In that case a prosecution witness had not in fact been sworn. He brought this to the attention of the U. S. Attorney, before he took the stand, when he was recalled for rebuttal testimony. The U. S. Attorney replied, "You have already been sworn before." The Court reversed the conviction and ruled that the defendant could not be held to have waived this objection.

Where constitutional rights are concerned the state through its attorney cannot mislead the accused into believing that his rights have been protected, and then, consistent with due process, rely on the fact that the defendant was misled as a waiver of the right.

6. The state court alternatively sought to blunt petitioner's claim with the suggestion that the error was not prejudicial. An accused denied the safeguard of sworn testimony is denied due process of law without the necessity for speculation as to the exact weight which the jury assigned to the testimony of the unsworn witness. In *Gibbons* v. *Territory,* the court observed, 5 Okl. Cr. 233-234, 115 Pac., at 138:

> "The testimony of no witness should be received who has not been properly sworn. It might be argued that the testimony of the witness on the point received was not of serious importance. The court cannot always tell upon what particular testimony a jury bases its verdict, and a man on trial for his life or liberty is entitled to all of the protection of the law."

In this case, the testimony of witness Shackelford was used by the State as an integral part of its prosecution against petitioner on all four counts of which he was convicted. She testified directly as to the offense charged in Count Four. And under the trial court's charge the alleged offense, narrated by Shackelford, was a "similar offense" constituting evidence, if accepted by the jury, establishing necessary "intent to defraud", supporting its verdict on all counts of the indictment. (Typed Tr., p. 497, R.).

Thus, the denial of due process of law in use of the unsworn testimony of Shackelford infected the entire trial and conviction of petitioner. His imprisonment on the basis of this trial would be a deprivation of liberty in contravention of the Fourteenth Amendment.

Conclusion

In no particular is the due process clause of greater import in its guarantees than in the realm of procedure. Rulings which scoff at the importance of procedural safeguards or obviate their assurance by so-called waivers undermine the very foundation of the due process clause. In our republic, and under our Constitution, the testimony of sworn witnesses is the only basis upon which free men can be deprived of life or liberty.

This case presents a substantial constitutional question, meriting review by this Court.

Respectfully submitted,

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